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No. 300

IN THE

Supreme Court of the United States

October Term, 1960

V. A. GOMEZ, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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To The Hon. Chief Justice Of The United States and The Hon. Associate Justices Of The Supreme Court Of The United States:

Presumptuous as it may seem, several readings and attempts at careful analysis of respondent's brief leads but to the inevitable conclusion that confusion exists in the minds of the authors of their brief. Thus, it appears necessary to make a brief reply to the contentions and statements embraced in respondent's brief.

Irrespective of what counsel or counsels were in consultation with Petitioner prior to Labor Day or a few days thereafter, 1960, the District Attorney, as well as the District Clerk had full knowledge that Petitioner had employed Bernard A. Golding, of Houston, Texas, as his sole attorney (Tr. 4). In fact, as early as November 1,

1960, or over a month previous to the time that this cause was set down for trial, the District Clerk of Howard County, was advised by letter of this fact. The case was set for trial for December 5, 1960.

Attached to Petitioner's First Motion for Continuance was a letter from Hon. Richard H. Levet, United States District Judge for the Southern District of New York in which it was plainly stated that Petitioner's sole counsel was then engaged in a complex narcotics conspiracy case and would be detained in that United States District Court for a considerable period of time (Tr. 7). Therefore, the contention that Petitioner counseled with numerous lawyers, if he did so, prior to the absolute selection of Golding as his sole attorney in this cause, is no longer of any significance or concern.

The important issue in this case is whether Gomez objected to the appointment of counsel, and whether this objection appears in the record of this cause. The record demonstrates with daylight clearness that Gomez did object to the appointment of any counsel by the Trial Court and insisted upon the presence of counsel of his own choosing to represent him. Gomez filed a supplemental motion for continuance which was summarily denied by the Trial Court.

The State, in its Reply Brief, carefully avoids the decision in *ex parte Mays*, 212 S.W. 2d 164, wherein it is stated:

> "We think that lacking an indigent person, the Court did not have the power to appoint an attorney for him, and therefore such an order was void."

Since under Texas law there can be no question as to Petitioner, in fact, having protested the appointment of counsel, the issue simmers down as to whether, in the unusual

circumstances of this case, the Trial Judge offended due process in appointing over protest of the Petitioner.

We do not question the propriety of a Trial Judge appointing an attorney for accused over his protest when the Defendant lacks intelligence to handle his own defense.

The person appointed as counsel for Petitioner in the Trial Court stated that he was not acquainted with the facts and felt unable to represent the Petitioner because of such lack of knowledge and his unfamiliarity with criminal law. Under the circumstances, the Trial Judge who appoints an attorney as defense counsel over his protest, cannot wash his hands of the mistakes made by such appointed counsel.

Glasser v. United States, 315 U.S. 60;
Avery v. Alabama, 308 U.S. 444;
Michel v. Louisiana, 350 U.S. 91;
Hawk v. Hann, 103 F. Supp. 138.

The appointed counsel requested the period of ten days respite in which to prepare the defenses for Petitioner. The Trial Court responded by saying that he was appointing counsel under the due process clause of the United States and of the State of Texas. Whatever that may mean, does not avoid the precept that fundamental fairness to a person charged with a crime requires careful judicial guidance of the conduct of the trial. And too, an essential attribute of a fair trial where the Court has appointed counsel places a burden on the Trial Court to protect the accused against hasty trials and obvious mistakes of appointed counsel. The mere genuflection in the path of justice by the appointment of counsel, such as Petitioner had, is far removed from that standard of adequate judicial guidance and the furnishing of effective counsel to this

Petitioner. *Johnson v. United States,* 110 F. 2d 562; *Powell v. Alabama,* 287 U.S. 45.

This record discloses that before the actual trial, the discussion of the case between appointed counsel and Gomez amounted to a mere few hours. This fact, together with the quick disposition of the Motion for Continuance properly filed by accused, hardly represents that "fairness" or "fundamental fairness essential to the very concept of justice" nor does it comport with the traditions of our people as to be "of the very essence of a scheme of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319.

To say that Petitioner was afforded effective counsel and that he was not deprived of due process of law under the record of this case, is tantamount to sweeping the fundamental rights of the accused under the rug and throwing his safeguards out the window.

Conclusion

Respect for preservation of Constitutional Rights and in the interest of good morals, this Writ should be granted.

Respectfully submitted,

BERNARD A. GOLDING
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Houston 2, Texas

Two copies of the above and foregoing have been served upon the Attorney General of the State of Texas by depositing the same in United States mail in an envelope properly addressed and with sufficient postage thereon, on this the 13th day of December, 1961.

Bernard A. Golding

APPENDIX "A"

THE STATE OF TEXAS §
COUNTY OF HOWARD §

KNOW ALL MEN BY THESE PRESENTS:

AFFIDAVIT

BEFORE ME, the undersigned authority, a Notary Public in and for Howard County, Texas, on this day personally appeared W. H. EYSSEN, JR., who, being first by me duly sworn, upon his oath, deposes and says:

My name is W. H. EYSSEN, JR., and I am a duly licensed and practicing attorney in the City of Big Spring, Howard County, Texas; I have resided in Big Spring since July, 1959, having moved here from Tulsa, Oklahoma after some five years employment as Corporation Counsel in such last named city;

That on or about December 4, 1961, at some time in my absence from the Court, I was appointed to defend one V. A. GOMEZ in his trial in Cause No. 3761, In The District Court of Howard County, Texas, 118th Judicial District; to the best of my recollection, I learned of my appointment at approximately 4:00 P.M. on that afternoon, immediately upon learning which, I proceeded to see the Honorable Ralph Caton, presiding Judge of such Court to discuss the matter of my appointment; I believe at this time I protested such appointment, stating that I would have unsufficient time within which to prepare a defense, and that I further pointed out to the Court that my principal courtroom experience had been civil practice not criminal and that I felt I could not fairly represent Mr. Gomez; my appointment was made, however, and at ap-

proximately 10:00 o'clock the next morning, in Open Court, I met Mr. Gomez for the first time; the Court announced my appointment in the case, and Mr. Gomez immediately informed the Court that he would not accept my appointment as his attorney, but that it was his desire that the case be postponed until his employed attorney, the Honorable Bernard A. Golding, of Houston, Texas, finished a trial then being held in The State of New York, could be present and act as his attorney; notwithstanding Mr. Gomez's objections, the case was called for trial, whereupon I filed a motion for ten days delay within which to make a proper effort to prepare for trial, feeling that the facts of the case were so complicated that I needed at least that much time in which to interview witnesses and brief the law applicable to the case; such motion was based on Article 474, Code of Criminal Procedure of The State of Texas, and upon my presenting such motion, Judge Caton overruled the same, stating that my appointment as attorney in the case had been made under the due process clause of The Texas Constitution and the Constitution of The United States; after the overruling of such motion, oral motion for postponement in order that I might prepare the case for trial; this motion was likewise overruled and we proceeded with hearing of the other motions presented by me and overruled by the Court;

None of the motions presented to, and acted upon by, the Court in this case were not considered on appeal due to clear oversight by the undersigned in securing approval thereof by the Court, and as a matter of fact, since the statement of facts was prepared in two volumes, the undersigned did not know that a separate certification thereof was necessary; as a result, it would appear that V. A.

Gomez did not receive due process of law in the manner in which his case was handled, although it was the stated intention of Judge Caton to so secure the same for him;

That the only contacts I had with Honorable Wayne Basden in the trial of this case were of my own seeking in an endeavor to learn as much as possible about the facts of the case, and the witnesses in the case in the limited time I had available;

That prior to my appointment in this case, I had never been acquainted with any of the principals in the case, and when the trial was completed, at attorney Golding's request, I had Attorney Basden make arrangements for securing the statement of facts, due to the fact that he was personally acquainted with Mr. Gomez, and further that Mr. Gomez did not consider me to be his attorney.

W. H. EYSSEN, JR.
W. H. Eyssen, Jr.

SWORN TO AND SUBSCRIBED BEFORE ME by the said W. H. EYSSEN, JR., this 8 day of December, 1961, to certify which witness my hand and seal of office.

WALTON D. MORRISON
Notary Public, Howard
County, Texas

(Seal)